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82-6697

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THOMAS WINFORD SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I.

WHETHER A "DEATH-QUALIFIED JURY" SELECTED FOR ITS ABILITY TO IMPOSE THE DEATH PENALTY IS MORE PRONE TO CONVICT A DEFENDANT THAN A JURY NOT SO SELECTED AND WHETHER SUCH A JURY IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY THUS DEPRIVING A CAPITAL MURDER DEFENDANT OF DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

II.

WHETHER THE ABSOLUTE FINANCIAL LIMITATION FOR INVESTIGATIVE ASSISTANCE OF $100 SET OUT IN ARK. STAT. ANN. SECTION 43-2419 IS INADEQUATE AND VIOLATIVE OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

III.

WHETHER PETITIONER WAS ARRESTED ILLEGALLY AND THE MATERIALS, INFORMATION AND CONSENT TO SEARCH GAINED SUBSEQUENTLY WERE TAINTED BY THE ARREST AND SEIZED IN VIOLATION OF PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS THUS REQUIRING SUPPRESSION OF ANY EVIDENCE OBTAINED THEREFROM.

IV.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY THE STATE'S FAILURE TO DISCLOSE THE IDENTITY OF A POTENTIALLY CRUCIAL WITNESS.

V.

WHETHER ARK. STAT. ANN SECTION 41-1501, ARKANSAS' CAPITAL MURDER STATUTE, BY OVERLAPPING WITH ARK. STAT. ANN SECTION 41-1502, THE FIRST DEGREE MURDER STATUTE, DENIES DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND CONSTITUTES CRUEL AND UNUSAL PUNISHMENT IN VIOLATION OF THE FIFTH AMENDMENT, EIGHTH AMENDMENT, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's convictions and death sentences is reported at Simmons v. State, 278 Ark. 305, 645 S.W.2d 680 (Feb. 7, 1983). A copy of the opinion is included in petitioner's appendix. Petition for rehearing was denied on March 14, 1983.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

§41-1302. Findings required for death sentence - Unanimity required. -
(1) The jury shall impose a sentence of death if it unanimously returns written findings that:
(a) aggravating circumstances exist beyond a reasonable doubt; and
(b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and
(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.
(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:
(a) aggravating circumstances do not exist beyond a reasonable doubt; or
(b) aggravating circumstances do not outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; or
(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.
(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

§41-1303. Aggravating circumstances. - Aggravating circumstances shall be limited to the following:
(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;
(2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;
(3) the person previously committed another felony an element of which was the use or threat of violence

to another person or creating a substantial risk of death to a person other than the victim;
(4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;
(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;
(6) the capital murder was committed for pecuniary gain; or
(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

41-1304. Mitigating circumstances. - Mitigating circumstances shall include, but are not limited to the following:
(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;
(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;
(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;
(4) the youth of the defendant at the time of the commission of the capital murder;
(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;
(6) the defendant has no significant history of prior criminal activity.

STATEMENT OF THE CASE

On January 8, 1981, petitioner was charged by information with the capital murders of Larry Price in the course of kidnapping; Detective Ray Tate, a police officer acting in the line of duty; Jawana Price in the course of kidnapping, robbery and rape; and Holly Gentry in the course of kidnapping, robbery and rape. The offenses were alleged to have occurred on or about January 5, 1981.

Petitioner was tried before a jury in the Crawford County Circuit Court on August 5-19, 1981. At the conclusion of the evidence, appellant was found guilty on all counts of capital murder. Evidence was then received relevant to sentencing. At the conclusion of the penalty phase of the bifurcated trial, the appellant was sentenced to death by electrocution.

Petitioner brings his petition for a writ of certiorari to the Arkansas Supreme Court following that court's affirmance of the trial court's judgment and sentence.

I.

PETITIONER WAS TRIED BY AN IMPARTIAL JURY WHICH REPRESENTED A FAIR CROSS SECTION OF THE COMMUNITY.

Petitioner filed two pre-trial motions relative to the voir dire of the jury on the imposition of the death penalty. First, he sought to prohibit questioning as to the death penalty. (T.99-100) Secondly, he sought to prohibit any jurors from being excused for cause on the basis of their opposition to the death penalty. (T.246-248) The trial court allowed questioning about the death penalty and stated that it would follow the guidelines in Witherspoon v. Illinois, 391 U.S. 510 (1968) as to challenges. (T.613-614) The State did not challenge any juror for cause based on their views of the death penalty. Two jurors who expressed some reservations about the death penalty were excused peremptorily by the State. (T.1874,2624) Three jurors were excused for cause upon petitioner's motion based on their inability to consider the minimum sentence for capital murder. (T.1845,2368,2518)

At an omnibus hearing on May 12, 1981, petitioner did offer five articles into evidence to which the prosecuting attorney did not object, but he did question their validity. (T.527) No specific ruling on the "guilt-prone" and "cross section" arguments was requested or made by the trial court. The trial court relied on Witherspoon in overruling petitioner's motions which found these two arguments unsupported in the record of that case.

On appeal to the Arkansas Supreme Court, petitioner conceded that the issue had been found meritless by that court

in previous cases, but he asked for reconsideration. Specifically, the Arkansas Supreme Court rejected the "cross section" argument in Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977), cert. denied 434 U.S. 894 (1977) and the "guilt prone" argument in Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035 (1981). The court also rejected petitioner's arguments in this case. Simmons v. State, 278 Ark. 305, 645 S.W. 2d 680 (1983).

Petitioner's jury was selected by the random selection process. The random selection process does not guarantee a proportionately accurate cross section of the community to match the demographics of an area. See Swain v. Alabama, 380 U.S. 202 (1965). A defendant must establish a prima facie violation of the fair cross section requirement by showing the distinctiveness of a group, that it is under-represented and that its members have been subject to systematic exclusion. See Duren v. Missouri, 439 U.S. 357 (1979). Respondent submits that the petitioner has failed to establish a cross section as no jurors were excused for cause based on their opposition to the death penalty. Both the petitioner and the State are entitled to a fair and impartial jury which will consider the full range of penalties. Jurors may properly be questioned as to whether they will consider all the penalties provided by law. Witherspoon v. Illinois, supra; Stephens v. State, 277 Ark. 113, 640 S.W.2d 94 (1982); Haynes v. State, 270 Ark. 685, 606 S.W.2d 563 (1980). In this case, petitioner benefited from such questioning as three jurors were excused who would not consider the minimum penalty.

those motions were a request for additional investigative funds and a request for additional counsel. (T.31,63)

Petitioner was charged with three counts of capital murder in the course of kidnapping, robbery and rape. (An additional count was for the capital murder of a police officer.) As the kidnapping occurred in one county and the bodies were found in another, the trial court allowed the full statutory amount of investigative funds from both counties. (T.348) The motion for additional counsel was held in abeyance at the May pretrial hearings and was never renewed. (T.349) (Petitioner was represented by the public defender and a deputy.) Petitioner's trial began on August 5 with the jury returning its verdicts on August 19, 1981.

Following their prospective request for additional funds, counsel did not renew this motion. There was no showing before the trial court, either before or after the trial, that the funds were indeed inadequate, that the investigation was inadequate or that counsel's representation was rendered ineffective by the amount of investigative funds allows.

In State v. Ruiz and Denton, 269 Ark. 331, 602 S.W.2d 625 (1980), the Arkansas Supreme Court held that attorneys have an obligation to represent indigents regardless of the adequacy of compensation. The right to counsel on appeal requires an "active advocate." Anders v. California, 386 U.S. 738 (1967). Whether before trial, at trial or on appeal, counsel is charged with the responsibility for investigation, preparation and presentation of a defendant's defense. Respondent recognizes

that inadequate pretrial investigation can be so gross as to deprive a defendant of his constitutional rights. See McQueen v. Swenson, 560 F.2d 959 (1977). Respondent submits that such facts are not present in this case.

In addition to the numerous pretrial motions and hearings, counsel was a strong advocate for petitioner at trial and on appeal. The State's case was circumstantial and required testimony by numerous witnesses all of whom were effectively cross examined. Counsel put on six witnesses including two from out of state. The defense witnesses testified primarily as to facts which cast doubt on the credibility of some State witnesses which indicated thorough knowledge and preparation by counsel in response to the State's case. On appeal, counsel raised twenty-two points to be relied upon with an extensive brief in support. There is no indication that counsel failed in performing any duty relative to investigation, preparation or presentation of petitioner's case. See Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981).

Respondent submits that petitioner's constitutional rights were not violated by the amount of investigative funds available to the public defender to assist him in the preparation of petitioner's case.

III.

OBJECTS SEIZED FROM PETITIONER AND HIS VEHICLE WERE PROPERLY OBTAINED FOLLOWING A LEGAL ARREST AND A CONSENSUAL SEARCH.

Petitioner alleges that his arrest was illegal and that his consent to search his vehicle was not made voluntarily. Thus, he contends that objects seized as a result should have been suppressed. Respondent submits that petitioner's arrest

was legal; that items seized from the vehicle were taken in a valid consensual search; and that items seized from petitioner's person were obtained pursuant to valid search warrants issued days after petitioner's arrest.

Petitioner filed numerous motions to suppress and extensive hearings were held on these motions. Petitioner gave a voluntary statement after being advised of his Miranda rights which explained his possession of a check on the account of one of the missing victims, Larry Price. This explanation was that the check was received for an illegal drug purchase. This statement was not used at trial, but was the basis for appellant's arrest as a parole violator. As no statement was used at trial, the cases of Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); and Taylor v. Alabama, 457 U.S. _____ (1982) upon which appellant relies are inapplicable here.

The Consent to Search form executed by appellant clearly stated that he did not have to sign it, that it would be given a receipt for anything taken and that he was freely and voluntarily consenting to the search. (T.810) (The only item seized and used at trial were the license tag and a book of matches.) Officer Mike Brooks testified at the hearing that petitioner stated he had no reason for them not to search his vehicle. (T. 870-871) Petitioner did not put on any evidence at the hearing. Petitioner was no stranger to the criminal justice system and certainly knew that he had the right to refuse. Informing a defendant of his right to refuse is not required, but is a factor to be considered. Schneckloth v. Bustamonte, 412 U.S.

218 (1973). A defendant can execute a valid consent to search even while under arrest. United States v. Watson, 423 U.S. 411 (1976).

Petitioner's clothing and blood, hair and saliva samples were seized pursuant to warrants. (T.8,16,24,26) Several exhibits and testimony as to test results on these items were introduced at trial. Petitioner does not now attack the validity of these warrants. These warrants were issued days after the arrest and contained additional information not available at petitioner's arrest. Even if the arrest was found to be illegal, which it was not, the seizure of objects from petitioner's person was not tainted by the arrest and was based on valid warrants.

Petitioner contends that he was placed under arrest at his workplace which is not supported by the record. Petitioner also overlooks the fact that there were two arrests - one for parole violations around noon and one later the same day after discovery of three of the bodies for capital murder.

The identification and apprehension of petitioner in this case resulted from effective police investigation. The four victims in this case were a young married couple, Larry and Jawanna Price, Mrs. Price's employer, Holly Gentry, and a police officer, Detective Ray Tate. The police detectives were first contacted on Monday afternoon by Jawanna Price and Holly Gentry in regards to a missing person report on Larry Price. Detective James Davis testified at the hearing that he and Detective Ray Tate met with Mrs. Price and Mr. Gentry. (T.764) Jawanna Price gave a description of the man with whom

she had last seen her husband that morning. Her husband had failed to meet her for lunch and when she checked at his place of employment, she was told a man had called to say Larry was not coming in. Detective Tate proceeded to the Price apartment with Mrs. Price and Mr. Gentry and was last heard from around 6:00 p.m. (T.769) Around 7:00 p.m., Detective Davis discovered the empty Price apartment and spoke with Burl Price, Larry's father, who was concerned about his son's disappearance.

Meanwhile, Gentry's vehicle, which Larry Price was trying to sell for him, had been discovered by the police near the Osco store at the Mall. Detective Tate's vehicle had been found in Crawford County near a Union 76 station. (T.772-773) Late that night, shortly before midnight, the police interviewed a cab driver, who had picked up a man at the Mall and taken him to the Price apartment around 5:00 p.m. This man fit the same general description given by Jawanna Price the previous day. (T.774-775) Officer Harlan Sweeten continued the investigation of this lead early the next morning with an interview of a couple, Mr. and Mrs. Boyce, who had ridden in the cab at the same time and gave a similar general description. (T.791-792)

On Monday morning, appellant had deposited a check written on an old closed account belonging to Larry Price. Tuesday mroning he tried to retrieve this check from his bank in Van Buren. The teller was aware that a Larry Price was missing and commented about the disappearance to appellant. (T.795-796) She also discussed appellant's effort to retrieve the check with another employee, Wanda Hicks. Mrs. Hicks noted appellant's

license number and contacted her husband, Wayne Hicks, Assistant Chief of Police for Van Buren. (T.794-798) Hicks contacted Sweeten with the Fort Smith police department, and the investigation continued. (T.794)

The license number checked out to the appellant and it was discovered that appellant was on parole. (T.794-795,801) A call was made to his place of employment which revealed that he had not been there the previous day. (T.844-845) Harlan Sweeten contacted the Sebastian County Sheriff's office and proceeded to appellant's place of employment with a sheriff's deputy, Officer Brooks, of the Fort Smith police force and Wayne Hicks of the Van Buren police force.

Appellant was asked to come to the Fort Smith police department in reference to the check. He said he would come. (T.803-804) He asked if he was under arrest and was told no. (T.803-804) No coercion was used: no threats, no physical restraint, no handcuffs, no gun. (T.805-806) Appellant was patted down and advised of his Miranda rights.

Appellant was again advised of his Miranda rights at police headquarters and signed a waiver of rights form. (T.809-810) He also signed a Consent to Search form for his vehicle. He was interviewed in an office by Sweeten and Brooks. (T.807-808) He told them he had received the check from Larry Price for some marijuana and quaaludes which he was to deliver later. (T.821-822) He asked what the problem with the check was and was informed of the investigation of four missing persons. (T.822-823) At this point, he requested counsel and exercised

his right to remain silent. These requests were scrupulously honored by the police. Officer Sweeten placed him under arrest for the admitted drug sale and parole violation. (T.824-825, 837-838) It was his opinion that the statement had established probable cause for those offenses. Respondent submits this assessment was correct under the commonsense approach called for in examining the legality of arrests. Draper v. United States, 358 U.S. 307 (1959)

While appellant was being interviewed, Officer Hatfield was interviewing appellant's sister at her residence. He discovered that she had picked up appellant the night before near where Officer Tate's car was discovered. (T.848-580) Hatfield had also talked to a man at the Price's apartment who had seen a stranger with Larry Price the previous morning; a man who fit the general description. One other witness had come forward by 2:15 p.m. Tuesday afternoon - Donald Seaton had observed a man intently watching Jawanna Price's car at the Mall Monday afternoon. He had jotted down the license number which checked out to be appellant's vehicle. (T.858-859) In addition, Burl Price had stated the signature on the check was not that of Jawanna or Larry Price. (T.856-857)

The bodies of Jawanna Price, Holly Gentry and Ray Tate were discovered around 4:00 p.m. Appellant was placed under arrest for capital murder at 5:40 p.m. on Tuesday, January 6, 1981. (The body of Larry Price was discovered the next day.) Respondent submits that at the time of the second arrest, probable cause clearly existed on the capital murder charges. Draper

v. United States, supra.

In reviewing the issues of an alleged illegal arrest and nonconsensual search, the Arkansas Supreme Court stated:

> [These two issues] may be discussed together, both turning on issues of fact. The undisputed testimony is that Simmons willingly accompanied the officers to the station and that he willingly consented to the search of his car. As in Lascano v. State, 275 Ark. 346, 631 S.W.2d 258 (1982), the officers were not asked whether they told Simmons that he did not have to accompany them It is argued that the officers should have told Simmons that he was a suspect in the disappearance of four persons, but that assertion is too sweeping. The officers knew that Simmons was on parole that he had sought the return of a Price check he thought to be bad, and that he had not been at work on Monday. Innocent explanations were obviously possible. Simmons's statements to the officers were not put before the jury. The only exhibits taken in the search of his car were the license plate, which was otherwise provable in countless ways, and a matchbook, the relevance of which is not clear. Thus, on subpoints (a) and (b) the trial judge's decision on issues of fact is not clearly erroneous, and even if it were no prejudice has been shown.

Respondent submits that the Arkansas Supreme Court correctly assessed this issue. The objects seized from petitioner and his vehicle were properly obtained following a legal arrest and a consensual search.

IV.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE DISCOVERY OF THE IDENTITY OF THE PERSON WHO FOUND THE BODY OF ONE OF THE VICTIMS.

Petitioner alleges constitutional violations in the State's alleged refusal to identify potential witnesses who had first sighted the body of Larry Price. Petitioner had moved for a mistrial on the basis that he had not known of these potential witnesses and had been unable to properly investigate his case or properly prepare his defense. On appeal, appellant's argument that evidence had been unfairly withheld was rejected by the Arkansas Supreme Court which found no evidence of bad faith on the part of the officer, no indication that the prosecutor was aware of these names, and no indication that the defense was handicapped by this lack of knowlege. This issue was not raised as a constitutional issue before the trial court or on appeal. It was raised as a discovery issue. There is no constitutional right to discovery and the holding in Brady v. Maryland, 373 U.S. 83 (1963) did not create one. Weatherford v. Bursey, 429 U.S. 545 (1977). Respondent submits that the facts of this case do not establish a discovery violation or a constitutional violation.

Petitioner filed a motion for discovery to which the State responded. (T.68-125) Listed among the State's potential witnesses was Deputy Sheriff Bill Grill. (T.126) Grill had been involved to some degree with the recovery of the bodies of the four victims in this case. The State chose not to call him as a witness, but the petitioner called him as his last witness.

Petitioner questioned Grill about his discovery of the body of Larry Price. He elicited the information that Grill had received a call from Lon Maxwell whose brother Clyde had been in the Clear Creek Recreation Area drinking beer and had seen what he thought was a body in heavy underbrush. Allegedly, the identity of the caller and the basis of his information had not previously been known to appellant. Upon questioning the witness about his previous failure to disclose such information, the State objected. The prosecuting attorney properly stated that Rule 509 of the Arkansas Uniform Rules of Evidence provides the proper procedure for the disclosure of information about informants and that appellant had not properly sought such information. (T.359)

Rule 17.1(d) of the Arkansas Rules of Criminal Procedure provides that the prosecuting attorney shall disclose to defense counsel any information which tends to negate the guilt of a defendant as to the offense charged or would tend to reduce the punishment therefor. The prosecuting attorney supplied the name of Bill Grill, but was not required under this rule to supply the names of the Maxwells. They were not going to be called as witnesses. Their only information was a partial sighting of one of the bodies. Such information cannot be construed to negate appellant's guilt under subsection (d) of Rule 17.1.

Rule 17.1 is specifically subject to the provisions of Rule 17.5 which provides in pertinent part:

Rule 15.5. Matters Not Subject to Disclosure.

> (b) Informants. Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. This subsection shall not be construed to permit refusal to disclose the identity of witnesses to be produced at any hearing or at trial.

The testimony of Bill Grill establishes that he was questioned several times by defense counsel and refused to name the caller as the caller wished to remain anonymous. (T.3591,3599) Appellant had filed numerous pretrial motions and there had been several pretrial hearings, yet appellant had never sought the undisclosed name of the caller as can be done under Rule 509 of the Arkansas Uniform Rules of Evidence as by a motion to compel disclosure.

Upon learning of the appellant's surprise about the information, the State withdrew its objection and the court called counsel to the bench to discuss the relevancy of the entire line of questioning. (T.3592) Despite appellant's alleged surprise, he had continued questioning the witness and had not objected to anything in his testimony. At the bench conference, defense counsel moved for a mistrial on the basis that he had not known of these potential witnesses and had been unable to properly investigate his case or properly prepare his defense.

These facts simply do not establish a failure to disclose requiring the declaration of a mistrial as in Nelson v. State, 274 Ark. 113, 622 S.W.2d 188 (1981) and Earl v. State, 272 Ark. 5, 612 S.W.2d 98 (1981). No evidence was presented by the State which surprised the appellant. The "surprising" evidence was

elicited by the appellant himself who chose to continue his examination after the denial of his motion for a mistrial. He elicited the information that in the deputy sheriff's opinion neither of the Maxwells had any personal knowledge about the body. (T.3603) Clyde Maxwell was intoxicated at the time. Lon Maxwell made the call and accompanied the sheriff to the site. Though admittedly this information is based partially on hearsay testimony, it was the appellant who elicited it. Furthermore, the information by its nature establishes the lack of prejudice; these men knew only about the possible discovery of one of the bodies, nothing about the crime itself or its perpetrator.

Had the appellant believed the Maxwells might help his case, it was incumbent upon him to request a continuance which he did not do. He called this witness knowing that he had not revealed the identity of the caller. He cannot now predicate error on testimony which he himself chose to introduce. Kaestel v. State, 274 Ark. 550, 626 S.W.2d 940 (1982).

Petitioner's constitutional rights were not violated by the discovery of the identity of the Maxwells. Their only connections with the case was the partial sighting of one of the bodies. Counsel chose to question the deputy about this sighting. This information neither hurt the defense or helped the State's case. The identity of the Maxwells was not exculpatory and did not fall within the holdings of Brady v. Maryland, supra, or United States v. Agurs, 427 U.S. 97 (1976) upon which petitioner relies.

V.

THE OVERLAPPING LANGUAGE OF THE CAPITAL AND FIRST DEGREE MURDER STATUTES DID NOT RENDER PETITIONER'S CONVICTIONS UNCONSTITUTIONAL.

Petitioner alleges that the overlapping of the capital and first degree murder statutes renders the Arkansas statutory scheme unconstitutional by rendering jury verdicts unreliable. This issue has been considered by the Arkansas Supreme Court and rejected many times. See, Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), vacated in part, 429 U.S. 808 (1976), aff'd. on remand, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878 (1977); Ruiz and Denton v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied, 454 U.S. 1093 (1981). See also Collins v. Lockhart, 545 F.Supp. 83 (E.D.Ark. 1982). (Remanded on May 11, 1983 on the issue of comparative review, petition for rehearing en banc pending.)

In a lengthy review necessitated by United States Supreme Court opinions, the Arkansas Supreme Court stated in Collins v. State, supra:

> We find that the Arkansas system of prosecuting and sentencing those found guilty of a charge of capital felony murder provides adequate safeguards against arbitrary, capricious or freakish imposition of the death penalty to successfully pass constitutional examination in the light of the Eighth and Fourteenth Amendment standards acertainable from the Woodson-Roberts-Gregg-Proffit-Jurek quintuplet offspring of Furman.

In Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980), the Arkansas Supreme Court held that there was no constitutional infirmities in either the overlapping of the capital murder and

first degree murder statutes or in the reasonable exercise of discretion by a prosecuting attorney in determining which crime to charge.

The United States Supreme Court has reached an almost identical issue in United States v. Batchelder, 442 U.S. 114 (1979), in which the defendant alleged prejudice because he was convicted under one of two federal gun control statutes which were worded identically but provided different punishments. The Court held such provisions are not void for vagueness and did not constitute due process or equal protection violations. Id. at 122-23. "So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." Id. at 123. The Court further approved the fact that prosecutorial discretion is involved in selecting which crime is charged. Id. at 124.

Juries are customarily given some discretion in sentencing. In capital cases the jury's discretion must be guided in a rational manner. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Beck v. Alabama, 447 U.S. 625 (1980) makes it clear that the facts of a given case may support the finding by a jury that any one of several offenses were committed by a defendant and that a defendant must be given the opportunity to be sentenced for a lesser offense if the facts warrant it.

No defendant charged and tried for capital murder could be prejudiced because the jury could also consider first degree

murder as a lesser included offense. The only possible result to a defendant would be an opportunity for leniency. Where there is no doubt that the evidence supports a conviction for capital murder, and where the statutory guidelines for conviction and sentence meet constitutional muster, a defendant cannot complain that he is convicted of that offense. See Batchelder, 442 U.S. at 123.

Petitioner filed a motion to quash the information charging him with capital murder. (T.260) He also filed motions to reduce the penalty and to reduce the charge. (T.88,94) On appeal, he argued that the statutes governing the procedure and trial of death penalty cases are unconstitutional; that they allow the arbitrary and discriminatory application of the death penalty; and finally that the overlapping of the murder statutes should be found void for vagueness. At an omnibus hearing on petitioner's numerous motions, no evidence was presented in support of the motions, and the trial court denied relief after arguments by counsel. (T.381-385) In his appeal brief, petitioner acknowledged the prior rulings of the Arkansas Supreme Court on this issue, and asked for reconsideration based upon Furman v. Georgia, supra and Gregg v. Georgia, supra.

The Arkansas death penalty statutes applicable to sentencing are analogous to the Georgia statutes approved in Gregg v. Georgia, supra, in that the jury's attention is properly focused on the circumstances of the crime and the characteristics of the defendant. No limitation is placed upon the jury's consideration of any mitigating factor. See, Eddings

v. Oklahoma, 454 U.S. _____(Jan. 19, 1982); Lockett v. Ohio, 438 U.S. 586 (1978). Yet, the jury is given guidance in their consideration of whether aggravating circumstances exist, whether they outweigh any mitigating circumstances and whether the death penalty is justified, all beyond a reasonable doubt. Ark. Stat. Ann. § 41-1302-1304 (Repl. 1977). Thus, the death penalty may be imposed consistently with fairness afforded each particular defendant. See, Furman v. Georgia, supra.

Respondent submits that the Arkansas capital murder statutes are not vague and misleading; juries are given proper guidance and petitioner's convictions are not unconstitutional by the application of those statutes.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

Although respondent recognizes that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arknsas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal.

Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that a copy of the above and foregoing pleading has been served on petitioner by placing a copy of same in the United States Mail, postage prepaid, addressed to Mr. John Settle, P. O. Box 1902, Fort Smith, Arkansas 72902, attorney of record for petitioner, this 14th day of June, 1982.

Leslie M Powell
LESLIE M. POWELL